INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	3
Argument	6
Conclusion	10

CITATIONS

Cases:

Breen v. *Selective Service Board*, 396 U.S. 460	6, 7
Crowley v. *Pierce*, 4 SSLR 3118, reversed, 461 F. 2d 614	9
Fein v. *Selective Service System*, 405 U.S. 365	6, 7, 8
Gregory v. *Hershey*, 311 F. Supp. 1 (judgment entered, 51 F.R.D. 188), reversed, *Gregory* v. *Tarr*, 436 F. 2d 513, certiorari denied, 403 U.S. 922	4, 5, 6, 8, 9
Hunt v. *Local Board*, 438 F. 2d 1128	9
McCarthy v. *Director*, 460 F. 2d 1089	9
Oestereich v. *Selective Service Board*, 393 U.S. 233	6, 7
Pasquier v. *Tarr*, 444 F. 2d 116	8, 9
Plotner v. *Resor*, 446 F. 2d 1066	9
Schrader v. *Tarr*, C.A. 7, No. 71-1767, decided July 28, 1972	9
Zeilstra v. *Tarr*, C.A. 6, No. 72-1131, decided August 24, 1972	9

Statutes and regulations: Page

Military Selective Service Act of 1967, 81 Stat. 100, as amended, 50 U.S.C. 451, *et seq.* (1964 ed., Supp. V) 3
Military Selective Service Act of 1971, 85 Stat. 348, as amended, 50 U.S.C. App. 451 *et seq.* 3
Section 10(b)(3), 50 U.S.C. App. 460 (b)(3) 2, 8
28 U.S.C. 1361 8
32 C.F.R. 1622.30(a) (Jan. 1, 1970) 2, 4

Miscellaneous:

Executive Order No. 11527, 35 Fed. Reg. 6571 4

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-309

HOWARD MARK SANDLER, PETITIONER

v.

NATIONAL DIRECTOR OF SELECTIVE SERVICE, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 44-46) is not yet reported. The opinions of the district court (Pet. App. 28-38, 38-44) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1972, and a timely petition for rehearing was denied on July 5, 1972. The petition for a writ

of certiorari was filed on August 23, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 10(b)(3) of the Military Selective Service Act bars pre-induction judicial review of the denial of a fatherhood deferment to petitioner.

2. Whether a decision of another district court in a class action, holding that registrants in petitioner's situation were entitled to fatherhood deferments—which decision the court of appeals reversed prior to the decision of the district court in the present case—authorized the district court here to entertain the present suit despite Section 10(b)(3).

STATUTES AND REGULATIONS INVOLVED

Section 10(b)(3) of the Military Selective Service Acts of 1967 and 1971, 50 U.S.C. App. 460(b)(3), provides in pertinent part:

> * * * No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title [section 462 of this Appendix], after the registrant has responded either affirmatively or negatively to an order to report for induction * * *.

32 C.F.R. 1622.30(a) (Jan. 1, 1970) provided:

> In Class III-A shall be placed any registrant who has a child or children with whom he main-

tains a bona fide family relationship in their home and who is not a physician, dentist or veterinarian, or who is not in an allied specialist category which may be announced by the Director of Selective Service after being advised by the Secretary of Defense that a special requisition under authority of section 1631.4 of these regulations will be issued by the delivery of registrants in such category, except that a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph.

STATEMENT

While petitioner was an undergraduate at college from 1963 to June 1967, he was granted a II-S student deferment under the then existing Selective Service law.[1] In September 1967, during his first year in graduate school, he was granted a II-S student deferment under the Military Selective Service Act of 1967, 50 U.S.C. App. 451, *et seq.* (1964 ed., Supp. V), which had been enacted on June 30, 1967. Upon the expiration of his II-S deferment in November 1968, petitioner was classified I-A.

---

[1] Universal Military Training and Service Act, 50 U.S.C. App. 451, *et seq.* (1964 ed.). That Act was amended in 1967 and the name was changed to the Military Selective Service Act of 1967 (P.L. 90-40, 81 Stat. 100); in 1971, the Act was again amended and the name changed to the Military Selective Service Act of 1971 (P.L. 92-129, 85 Stat. 348).

In December 1969, petitioner requested a III-A deferment based upon his fatherhood status. The board, however, refused this request on the ground that he had received a II-S deferment after June 30, 1967, while a graduate student. The basis for this ruling was 32 C.F.R. 1622.30(a), which, at the relevant time,[2] precluded a fatherhood deferment to any registrant who had been "classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 * * * [June 30, 1967]."

Petitioner requested reconsideration. He claimed he was a member of the class covered by the Michigan district court's decree in the class action of *Gregory* v. *Hershey*, 311 F.Supp. 1 (E.D. Mich., judgment entered, February 27, 1970, 51 F.R.D. 188). The Michigan court had ruled that fathers who had received II-S deferments under the 1967 Act while graduate students, rather than as undergraduates, could not be denied fatherhood deferments under 32 C.F.R. 1622.30(a). Since the induction of such registrants claiming fatherhood deferments had been enjoined by the Michigan district court, petitioner argued that the Selective Service System was bound by that ruling.

---

[2] Executive Order No. 11527, April 23, 1970, 35 F.R. 6571, terminated the III-A fatherhood deferment and 32 C.F.R. 1622.30(a) as cited above was revoked by that order. However, this change did not apply to persons, such as petitioner, who claimed eligibility prior to that date. All references herein to 32 C.F.R. 1622.30(a) are to the regulation as it stood prior to that change: 32 C.F.R. 1622.30(a) (January 1, 1970).

The local board, treating petitioner's request for reconsideration as an appeal, forwarded his file to the Appeal Board, which upheld the I-A classification. On December 2, 1970, petitioner was mailed an order to report for induction on January 28, 1971. On December 17, 1970, his case was specially reviewed by the National Director of Selective Service, who advised the State Director that petitioner "is not eligible for Class III-A (paternity) deferment. Until such time as the *Gregory* v. *Hershey* case is resolved by higher court action it would appear Mr. Sandler has been properly classified and processed" (Pet. 5).

On January 22, 1971, petitioner brought the instant action in the district court in Maryland to enjoin his induction, and to obtain mandatory and declaratory relief. Four days later, on January 26, 1971, the Sixth Circuit reversed *Gregory* v. *Hershey*, *supra*. *Gregory* v. *Tarr*, 436 F. 2d 513, certiorari denied, 403 U.S. 922. The district court, in the present case, after issuing a temporary restraining order in July, 1971, granted the government's motion to dismiss the complaint, on the basis of the Sixth Circuit's reversal of *Gregory* v. *Hershey* (Pet. App. 28-38). Petitioner moved to amend the judgment on the ground that although the *Gregory* district court decision had been reversed, Selective Service officials were bound by that judgment until it was reversed and could not, until then, order him to report for induction.

The district court denied the motion (Pet. App. 38-44). It ruled that the order in *Gregory* had no effect outside the jurisdiction of the court that entered it, and also that pre-induction judicial review of the plaintiff's complaint was barred by Section 10(b)(3) of the Military Selective Service Act. The Fourth Circuit affirmed *per curiam* (Pet. App. 44-46).

ARGUMENT

1. Petitioner does not deny—as the Sixth Circuit correctly held in the *Gregory* case—that Section 10(b)(3) bars pre-induction judicial review of the denial of his fatherhood deferment. That section precludes such review of the "classification or processing of any registrant by local boards" except as a defense to a criminal prosecution initiated after a registrant has responded to an induction order. This Court has recognized that, despite the literal sweep of this provision, it does not bar pre-induction review of classifications whose effect is to deny a registrant either an exemption or a deferment which the statute expressly gives him. *Oestereich* v. *Selective Service Board*, 393 U.S. 233; *Breen* v. *Selective Service Board*, 396 U.S. 460. In reaffirming those decisions last Term (*Fein* v. *Selective Service System*, 405 U.S. 365, 376), the Court stated that those decisions permit pre-induction judicial review only "in that rather rare instance where administrative action, based on reasons unrelated to the merits of the claim to exemption or deferment, deprives the registrant of the clas-

sification to which, otherwise and concededly, he is entitled by statute * * *" (*id.* at 374-375).

Under that test, the Court concluded that Fein's challenges to the constitutionality of the administrative procedures by which his conscientious objector claim had been denied, did not come within this narrow exception to Section 10(b)(3). This was so, the Court ruled, because unlike the classification of the registrants in *Oestereich* and *Breen*, whose "claimed status * * * was factually conceded and thus was assured by the statute upon objective criteria," Fein's "administrative classification action was, in contrast, a product of the 'process' and the 'system of classification'" (405 U.S. at 376).

The courts below correctly concluded that Section 10(b)(3) similarly bars pre-induction judicial review of the denial of petitioner's fatherhood deferment. As in *Fein*, the local board's action did not deny the registrant any statutory status to which he was concededly factually entitled. The Selective Service System interpreted and applied its regulation to deny a fatherhood deferment to a registrant who had received a student deferment after June 30, 1967, whether as an undergraduate or as a graduate student. The denial of petitioner's deferment was thus not "based on reasons unrelated to the merits of the claim to exemption or deferment" and did not deprive him of the "classification to which, otherwise and concededly, he is entitled by statute" (*Fein*, *supra*, 405 U.S. at 374-375). To the contrary, the denial of petitioner's fatherhood deferment, like the denial of

Fein's conscientious objector claim, was "a product of the 'process' and the 'system of classification'" (*Fein*, *supra*, 405 U.S. at 376). Accordingly, it was not subject to pre-induction judicial review.[8]

2. Petitioner argues, however, that Section 10(b)(3) does not bar his suit because he is challenging not the denial of his fatherhood deferment but only the action of the Selective Service System in issuing him an induction order at a time when the district court judgment in *Gregory* was still outstanding. Petitioner's induction order had been stayed, however, and when the court of appeals reversed in *Gregory*—four days after he filed his suit—petitioner, like the plaintiffs in *Gregory* and all other members of that class, was subject to immediate induction. Petitioner concedes (Pet. 12), as he must, that he is not now entitled to a fatherhood deferment on the basis of any *res judicata* effect of the *Gregory* district court decision. Similarly, he cannot rely upon that decision to justify a pre-induction challenge to the denial of his fatherhood deferment while refusing to recognize that, as a result of the court of appeals' reversal, that judgment "collapsed" and was of no further effect (*Pasquier* v. *Tarr*, 444 F. 2d 116, 117 (C.A. 5)).

The court of appeals' ruling that in these circumstances Section 10(b)(3) bars pre-induction review

---

[8] Petitioner argues that the bar of Section 10(b)(3) can be avoided by bringing an action in the nature of *mandamus* under 28 U.S.C. 1361. *Fein*, however, was a suit under 28 U.S.C. 1361, *inter alia*. See 405 U.S. at 366.

of the denial of petitioner's fatherhood deferment is in accord with the consistent line of decisions rejecting similar attempts by registrants who are not parties to the *Gregory* suit to rely upon the reversed district court decision in that case to avoid induction. In addition to the decision below, see *Zeilstra* v. *Tarr*, (C.A. 6) No. 72-1131, decided August 24, 1972; *Schrader* v. *Tarr*, C.A. 7, No. 71-1767, decided July 28, 1972 (Pet. App. 74). See, also, *McCarthy* v. *Director*, 460 F. 2d 1089 (C.A. 7); *Pasquier* v. *Tarr*, *supra*.[4] There is no occasion for further review of that ruling.

3. Finally, the issue has but limited importance. It involves only a narrow category of registrants—those who (a) were denied fatherhood deferments because they received a student deferment after June 30, 1967, while a graduate student and (b) were issued an induction order while the *Gregory* decision was pending on appeal. The number of registrants so situated necessarily is extremely small. Moreover, the fatherhood deferment was terminated in 1970. See n.2, p. 4, *supra*.

---

[4] *Hunt* v. *Local Board*, 438 F. 2d 1128 (C.A. 3), cited by petitioner, is of dubious validity since that court relied on the district court decision in *Gregory* v. *Hershey*, *supra*, which was subsequently reversed. The Fifth Circuit decision in *Plotner* v. *Resor*, 446 F. 2d 1066, also cited by petitioner, was withdrawn by that court on rehearing, the appeal was dismissed as moot, and the panel's opinion at 446 F. 2d 1066 was decreed "to have no precedential value" (*per curiam* opinion, No. 31030, August 18, 1972). *Crowley* v. *Pierce*, 4 SSLR 3118 (M.D. Fla.), upon which petitioner also relies, was recently reversed, 461 F. 2d 614 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

HARLINGTON WOOD, JR.,
Assistant Attorney General.

MORTON HOLLANDER,
ROBERT E. KOPP,
Attorneys.

OCTOBER 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 478103 221